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7 IN THE UNITED STATES DISTRICT COURT  
8 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
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10 CLINT JEFFREY BOWEN,

No. C 12-3083 MMC

11 Plaintiff,

**ORDER GRANTING DEFENDANTS'  
MOTION TO DISMISS**

12 v.

13 ACCESS AMERICA, et al.,

14 Defendants.  
15 \_\_\_\_\_/

16 Before the Court is AGA Service Company and Jefferson Insurance Company's  
17 (collectively, "defendants") motion, filed October 29, 2012, to dismiss plaintiff Clint Jeffrey  
18 Bowen's First Amended Complaint and to strike the punitive damages claim. Plaintiff has  
19 filed opposition, to which defendants have replied. Having read and considered the papers  
20 filed in support of and in opposition to the motion, the Court rules as follows.<sup>1</sup>

21 **FACTUAL AND PROCEDURAL BACKGROUND**

22 Plaintiff alleges he purchased from defendants an insurance policy that would cover  
23 emergency medical care, up to \$25,000, and emergency medical transportation, up to  
24 \$250,000, as needed during a trip to Costa Rica. Plaintiff alleges that on multiple  
25 occasions during the trip, he was assaulted by unknown assailants, suffered serious  
26 injuries, and was taken to a hospital where he received treatment. Plaintiff further alleges  
27 that on each occasion, medical doctors advised defendants that he needed to be returned  
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<sup>1</sup> On December 3, 2012, the Court took the matter under submission and vacated the hearing scheduled for December 7, 2012.

1 to the United States for further care, but defendants denied coverage for his expenses.

2 By order filed October 5, 2012, the Court dismissed the Second Cause of Action,  
 3 (“Common Counts”), Third Cause of Action (“Fraud”), and Fourth Cause of Action  
 4 (“Negligence”), as alleged in plaintiff’s Complaint, and struck plaintiff’s prayer for exemplary  
 5 damages. Plaintiff thereafter filed a First Amended Complaint (“FAC”), in which he alleges  
 6 a new Second Cause of Action (“Breach of Covenant of Good Faith and Fair Dealing”),  
 7 amends the Third Cause of Action (“Fraud”), and requests punitive damages. By the  
 8 instant motion defendants move pursuant to Rule 12(b)(6) of the Federal Rules of Civil  
 9 Procedure to dismiss plaintiff’s Second and Third Causes of action, for failure to state a  
 10 claim on which relief may be granted, and to strike plaintiff’s prayer for punitive damages.

### 11 **LEGAL STANDARD**

12 Dismissal under Rule 12(b)(6) of the Federal Rules of Civil Procedure can be based  
 13 on the lack of a cognizable legal theory or the absence of sufficient facts alleged under a  
 14 cognizable legal theory. See Balistreri v. Pacifica Police Dep’t, 901 F.2d 696, 699 (9th Cir.  
 15 1990). Rule 8(a)(2), however, “requires only ‘a short and plain statement of the claim  
 16 showing that the pleader is entitled to relief.’” See Bell Atlantic Corp. v. Twombly, 550 U.S.  
 17 544, 555 (2007) (quoting Fed. R. Civ. P. 8(a)(2)). Consequently, “a complaint attacked by  
 18 a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations.” See id.  
 19 Nonetheless, “a plaintiff’s obligation to provide the grounds of his entitlement to relief  
 20 requires more than labels and conclusions, and a formulaic recitation of the elements of a  
 21 cause of action will not do.” See id. (internal quotation, citation, and alteration omitted).

22 In analyzing a motion to dismiss, a district court must accept as true all material  
 23 allegations in the complaint, and construe them in the light most favorable to the  
 24 nonmoving party. See NL Industries, Inc. v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986). “To  
 25 survive a motion to dismiss, a complaint must contain sufficient factual material, accepted  
 26 as true, to ‘state a claim to relief that is plausible on its face.’” Ashcroft v. Iqbal, 556 U.S.  
 27 662, 678 (2009) (quoting Twombly, 550 U.S. at 570). “Factual allegations must be enough  
 28 to raise a right to relief above the speculative level[.]” Twombly, 550 U.S. at 555. Courts

1 “are not bound to accept as true a legal conclusion couched as a factual allegation.” See  
 2 Iqbal, 556 U.S. at 678 (internal quotation and citation omitted).

3 Generally, a district court, in ruling on a Rule 12(b)(6) motion, may not consider any  
 4 material beyond the complaint. See Hal Roach Studios, Inc. v. Richard Feiner & Co., 896  
 5 F.2d 1542, 1555 n. 19 (9th Cir. 1990). Documents whose contents are alleged in the  
 6 complaint, and whose authenticity no party questions, but which are not physically attached  
 7 to the pleading, however, may be considered. See Marder v. Lopez, 450 F.3d 445, 448  
 8 (9th Cir. 2006). In addition, a district court may consider any document “the authenticity of  
 9 which is not contested, and upon which the plaintiff’s complaint necessarily relies,”  
 10 regardless of whether the document is referenced in the complaint. See Parrino v. FHP,  
 11 Inc., 146 F.3d 699, 706 (9th Cir. 1998). Finally, the Court may consider matters that are  
 12 subject to judicial notice. See Mack v. South Bay Beer Distributors, Inc., 798 F.2d 1279,  
 13 1282 (9th Cir. 1986).

## 14 DISCUSSION

### 15 1. Covenant of Good Faith and Fair Dealing

16 In his Second Cause of Action, plaintiff alleges defendants breached the covenant of  
 17 good faith and fair dealing by performing none of its obligations under the subject contract  
 18 of insurance, and that in committing such breach “acted fraudulently and with conscious  
 19 disregard for [p]laintiff.” (See FAC at 9:17-18.) Where an insurer “acts unreasonably and  
 20 without proper cause in failing to investigate a claim, refusing to provide a defense, or  
 21 either delaying or failing to pay benefits due under the policy, the insured can sue in tort for  
 22 the breach of the covenant of good faith and fair dealing.” Emerald Bay Cmty. Ass’n v.  
 23 Golden Eagle Ins. Corp., 130 Cal. App. 4th 1078, 1093 (2005). To successfully state such  
 24 a claim, the plaintiff must allege economic loss. See id. at 1094 (“Since a tort action for  
 25 breach of the covenant of good faith and fair dealing is one seeking recovery of a property  
 26 right, not personal injury, to prevail the insured must show proof of economic loss.”)  
 27 (internal quotation and citation omitted); see also Gourley v. State Farm Mut. Auto. Ins. Co.,  
 28 53 Cal. 3d 121, 129 (1991) (“Breach of the implied covenant is actionable in the insurance

1 context because such conduct causes financial loss to the insured, and it is that loss which  
2 defines the cause of action.”).

3 Defendants argue plaintiff’s claim fails for the reason that plaintiff has not alleged  
4 economic loss as a result of defendants’ breach of contract. In opposition, plaintiff first  
5 argues the economic loss requirement “should not apply here” because, according to  
6 plaintiff, the insurance contract at issue is not “a simple insurance indemnity policy,” but  
7 instead constitutes a “managed care” insurance policy requiring defendants to monitor his  
8 medical treatment in addition to indemnifying his claims. (See Opp’n at 5:1-23.) As a  
9 result, plaintiff argues, the case law requiring economic loss is inapplicable to the instant  
10 insurance policy.

11 Irrespective of whether plaintiff is correct in his characterization of the subject  
12 insurance policy, he has cited to no case or statutory authority, nor has the Court located  
13 any such authority, holding the standard elements of a claim for breach of the implied  
14 covenant of good faith and fair dealing do not apply to managed care insurance policies.  
15 Rather, any contractual obligations defendants may have failed to perform beyond an  
16 obligation to indemnify plaintiff are relevant only to the issue of whether defendants  
17 breached the insurance contract, not to whether plaintiff is required to allege economic loss  
18 resulting from such breach. See, e.g., Richards v. Sequoia Ins. Co., 195 Cal. App. 4th 431,  
19 438 (2011) (affirming summary judgment in favor of defendant on claim for breach of  
20 covenant of good faith and fair dealing where defendant allegedly breached contract by not  
21 providing defense to underlying lawsuit but there was “no evidence of . . . economic loss in  
22 [the] record.”).

23 Alternatively, plaintiff asserts he has incurred financial loss as a result of defendants’  
24 breach and that he has pleaded such a loss in his complaint. In particular, citing  
25 paragraphs one and six of the FAC, respectively, plaintiff contends he has alleged he has  
26 been unable to work due to defendants’ conduct (see Opp’n at 8:14-17) and that “[he]  
27 himself needed to enable his return” to the United States and to a medical facility. (See id.  
28 at 8:23-24.) Neither such allegation, however, is contained in the cited paragraphs, nor

anywhere else in the FAC.<sup>2</sup>

Accordingly, the Second Cause of Action will be dismissed with leave to amend.

## **2. Fraud**

By its prior order, the Court dismissed with leave to amend plaintiff's Third Cause of Action, titled "Fraud," for the reason that plaintiff had not pleaded fraud with the particularity required by Rule 9(b) of the Federal Rules of Civil Procedure. Defendants argue plaintiff's complaint again fails to plead the circumstances constituting fraud with particularity. In opposition, plaintiff relies on his newly added allegation, made on information and belief, that "[d]efendants never accomplished the totality of their stated promises for any customer." (See FAC at 10:14-15.) Such allegation is, at best, ambiguous and, as noted, conclusory in nature. Consequently, plaintiff again fails to plead a claim of fraud. See Iqbal, 556 U.S. at 678 (holding courts "are not bound to accept as true a legal conclusion as a factual allegation").<sup>3</sup> To the extent plaintiff may be relying as well on his newly added allegation that defendants, in failing to perform their stated contractual obligations, "acted fraudulently and with conscious disregard for [p]laintiff" (see FAC at 10:11-12), any such reliance likewise fails, for both the reason that such allegation is conclusory in nature and because California law requires "something more than nonperformance" to establish a claim of fraud predicated on failure to perform a contractual promise. See Tenzer v. Superscope, Inc., 39 Cal. 3d 18, 30 (1985) (rejecting argument that "subsequent failure to perform as promised [under contract] warrants the inference that defendant did not intend to perform when she made the promise").

Accordingly, the Third Cause of Action will be dismissed with further leave to amend.

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<sup>2</sup> Moreover, it is unclear what plaintiff means by the phrase "needed to enable his return." (See id.)

<sup>3</sup> Plaintiff's reliance on extrinsic evidence (see Opp'n at 10:13; Decl. of Alexander Anolik) likewise is unavailing. As discussed, in deciding a motion to dismiss, a court may consider only the allegations in the complaint, documents whose contents are alleged or relied upon therein, and matters subject to judicial notice. Moreover, the declaration suffers from the same lack of factual support as does the FAC. (See Decl. of Alexander Anolik ¶ 15.)

